



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL APPEAL NO.37 OF 2014**

**EAST AFRICA SEA FOOD LTD.....1<sup>ST</sup> APPELLANT**

**WILLIAM KIPYEGON PERIMOI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**PETER LANGAT (Suing as the personal representative of the estate of**

**ALBERT LANGAT) DECEASED.....RESPONDENT**

**(Being an appeal from the Judgment of Hon. S M S Soita (Ag CM) in Kericho**

**CMCC No.56 of 2012 delivered on 23/9/2013)**

**JUDGMENT**

1. On 23/9/201, Judgment was delivered in Kericho CMCC No.56 of 2012 in favour of the Respondent against the Appellants as follows;

***Liability – 100%***

***(a) Pain & Suffering                      Kshs. 25,000/=***

***(b) Loss of Life                              Kshs. 150,000/=***

***(c) Loss of Dependency                  Kshs. 2,688,000/=***

***(d) Special damages                      Kshs. 100,980/=***

***(e) Costs and interests at court rates***

***Total    Kshs.2,963,980/=***

2. The suit arose of an accident which occurred on 6/2/2010 involving the Appellants motor vehicle Registration No. KAZ 543B ZC 614 Trailer Mitsubishi Fuso was being driven by the 2<sup>nd</sup> Appellant and motor vehicle Reg No. KAG 905D pickup which was being driven by the deceased.

3. The Accident occurred along Bomet – Sotik road at Soimet when the trailer Registration No. KAZ 543B ZC/6141 hit a bump and veered to left side where it hit motor vehicle No. KAG 905D pickup which was being driven by the deceased ALBERT LANGAT who died on the spot together with one **KIPMWETICH** (also deceased).

4. **PW2 (GEOFFREY KIPKOECH LANGAT)** was a passenger in motor vehicle registration No. KAG 905D and he was an eye witness and a survivor of the accident. He said the 2<sup>nd</sup> Appellant was charged with causing death by dangerous driving and he pleaded guilty and he was convicted on his own plea of guilty.

5. The Appellant have appealed against both the finding on liability and the quantum of damages on the following grounds;

***(i) THAT the trial misdirected itself in finding the Appellant 100% liable.***

*(ii) THAT the trial court failed to apply known principles in the law of negligence.*

*(iii) THAT the damages awarded were profusely excessive.*

*(iv) THAT the ratio adopted by the trial court in the circulation of the award under loss of dependency was not commensurate with facts on record.*

*(v) THAT the trial court erred in law and fact in adopting excess multiplier and failed to take into account the vicissitudes of life.*

6. The parties filed written submissions in the appeal which I have duly considered.

7. On the issue of liability, the appellants submitted that the respondent failed to conclusively prove that the appellants were fully liable for the occurrence of the accident and further submitted that since the accident was a collision between two motor vehicles, the deceased was also to blame for the occurrence of the accident and that the deceased's estate ought to shoulder 50% of the liability.

8. On the issue of quantum of damages, the appellant submitted that for special damages they must not only be specifically pleaded but also strictly proved, the appellant cited the Court of Appeal case of **Hahn vs. Singh Civil Appeal No. 42 of 1983 [1985] KLR 716**, the appellant further submitted that the respondents pleaded a total amount of Kshs. 100,980 but proved Kshs. 32,100, the appellants therefore submitted that the respondents were entitled to Kshs. 32,100. The appellants contended the receipts produced for burial expenses.

9. On the issue of general damages awarded under the Law Reform Act and the Fatal Accidents Act, the appellant submitted that for pain and suffering a sum of Kshs. 10,000 was sufficient as the deceased died on the spot, for loss of expectation of life Kshs. 80,000 was sufficient as the deceased was 30 years of age, for loss of dependency the appellant contended the multiplicand, multiplier and dependency ratio applied by the trial court.

10. On the issue of liability, the respondent submitted that the standard of proof in civil cases is on a balance of probabilities and that the respondent discharged the burden of proof on the negligence of the appellants. The 2nd appellant (driver) was charged with causing death by dangerous driving at Sotik Law Courts, the respondent produced the charge sheet, proceedings and conviction of the 2nd appellant vide Sotik Traffic Case No. 79 of 2010.

11. The respondent submitted that the appellants statement of defence did not raise the issue of contributory negligence, they cited the case of **Fookes vs. Slaytor [1978] 1WLR 1293** in which it was held that contributory negligence must be specifically pleaded.

12. The respondent further submitted that the appellants did not challenge/controvert the evidence on negligence or produce evidence to disprove allegations on negligence of the appellants and that the court should dismiss any attempts by the appellants to adduce evidence by way of submissions.

13. The respondent further submitted that the decision of the trial magistrate on liability was based on correct principles of law and evaluation of evidence presented before him.

14. On the issue of quantum of damages, the respondent submitted that they were not unreasonably high and sought to have the appeal dismissed with costs.

15. The duty of the 1<sup>st</sup> appellate court is to evaluate the evidence and to arrive at its own conclusion while bearing in mind that the trial court had the opportunity to see the witnesses.

16. The issues for determination in this appeal are as follows;

*(i) Whether the trial court was proper in finding the Appellants 100% liable for the accident.*

*(ii) Whether the award of damages was excessive.*

17. On the issue of liability, there was evidence that the 2<sup>nd</sup> Appellant who was the driver of the 1<sup>st</sup> Appellant pleaded guilty to the charge of causing death by dangerous driving and he was convicted.

18. The Respondent's witness (PW2) was an eye witness and a survivor of the Accident. He said the accident occurred when the trailer hit a bump and veered to left side where it hit the pickup killing the driver and one passenger instantly.

19. I find that the Respondent proved its case to the required standard which is on a balance of probabilities and therefore the trial court was proper in finding the Appellants 100% liable.

20. On the issue of assessment of quantum of damages there is no evidence that the court applied wrong principles and arrived at an erroneous figure.

21. The Court of Appeal in **BASHIR AHMED BUTT VS. UWAIS AHMED KHAN (1982-88) KAR**, set out the parameters within which an appellate court will interfere with an award of general damages, when it stated: **"An appellate court will not disturb an award for general**

*damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”*

22. Similar sentiments were expressed in *LOICE WANJIKU KAGUNDA VS. JULIUS GACHAU MWANGI CA 142/2003 (UR)*, by the same court, when it said: *“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. ”*

23. In *POWER LIGHTING COMPANY LTD & ANOR VS. ZAKAYO SAITOTI NAINGOLA & ANOR [2008] eKLR*, Nambuye J. in upholding the decision of the trial court set out principles court can use in order to determine whether or not to interfere with quantum of damages: *“On quantum the court in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages (1) Damages should not be inordinately too high or too low; (2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered; (3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts; (4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.”*

24. I wish to address myself on the issue of special damages and associate myself with the findings of the Court of Appeal, in *PREMIER DIARY LIMITED VS. AMARJIT SINGH SAGOO & ANOR [2013] eKLR*, the Court of Appeal stated as follows; *“We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more than this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable to on the issue of special damages.”*

25. I find that the damages awarded were not so low or so high as to warrant interference by this court.

26. The appeal herein lacks in merit and the same is dismissed with costs to the Respondent.

27. This court upholds both the finding on liability and assessment of damages

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 17TH DAY OF DECEMBER 2021.**

**A. N. ONGERI**

**JUDGE**